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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

# No. 766

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

*Petitioner,*

*vs.*

CLARENCE GREEN, TRADING AS GREEN'S DAIRY; G. P. JULIUS, TRADING AS JULIUS' DAIRY; JAMES SUTCLIFF, OF ARNOLD ICE CREAM COMPANY; GEORGE M. COOPER, TRADING AS QUALITY AND SERVICE DAIRY; R. E. NOGLE, TRADING AS SHILOH DAIRY; PAUL J. BECK, TRADING AS BECK'S DAIRY; R. H. EISENHART, TRADING AS EISENHART'S DAIRY; J. B. WARNER OF WARNER AND SONS' DAIRY; WALTER C. HOWE, TRADING AS HOWE'S DAIRY; PAUL E. LANDIS, TRADING AS LANDIS DAIRY; RYDER'S DAIRY, INC.; CHARLES A. HOAK, TRADING AS HOAK'S MODERN DAIRY; G. P. PARTHEMORE AND SONS, A PENNSYLVANIA CORPORATION; LOUIS J. MALLOY, OF MALLOY'S DAIRY; H. W. ERDMAN, OF LYKENS DAIRY; EDWARD HONICKER, TRADING AS HONICKER'S DAIRY; EARL H. FETTER, TRADING AS FETTER'S DAIRY,

*Plaintiffs,*

AND TITUSVILLE DAIRY PRODUCTS COMPANY, A PENNSYLVANIA CORPORATION,

*Intervening Plaintiff.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

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*Deputy Attorney General,*
*Counsel for Petitioner.*

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# SUPREME COURT OF THE UNITED STATES

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*Plaintiffs,*

AND TITUSVILLE DAIRY PRODUCTS COMPANY, A PENNSYLVANIA CORPORATION,

*Intervening Plaintiff.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The Milk Control Commission of the Commonwealth of Pennsylvania, petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the Supreme

Court of Pennsylvania entered October 28, 1940, and the order of said court refusing reargument entered November 26, 1940, to No. 6 May Term 1941, in said court.

## Opinion Below.

The opinion of the Supreme Court of Pennsylvania, delivered by Chief Justice Schaffer, with whom three other Justices concurred, is reported in 340 Pa. 1, 16 Atlantic Reporter, 2nd Series, page 9, and also appears in the record of the present proceedings (R. 463). A dissenting opinion was filed by Mr. Justice Stern, in which Mr. Justice Patterson joined. It is reported in 340 Pa. 4, 16 Atlantic Reporter, 2nd Series, page 10, and also appears in the record of the present proceedings (R. 465). The opinion of the court entered October 28, 1940, affirms the decree entered by the Court of Common Pleas of Dauphin County. The opinions of the latter court are reported in 48 Dauphin County Reporter, pages 385 and 416; they also appear in the printed record before the Supreme Court of Pennsylvania filed herewith, pages 292a and 352a. Dissenting opinions filed by the Sitting Chancellor in that court are reported in 48 Daughin County Reporter, pages 403 and 419. They also appear in the printed record before the Supreme Court of Pennsylvania filed herewith at pages 318a and 356a.

## Jurisdiction.

The order of the court below, the Supreme Court of Pennsylvania, was entered October 28, 1940 (R. 463). A petition for reargument filed in the same court was denied November 26, 1940 (R. 509). By orders entered December 5, 1940, and February 5, 1941, the record of the court below is being held there pending the outcome of the present petition (R. 510, 513). The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code as amended, 28 U. S. C. 344 (b).

The question of the violation of the equal protection clause of the 14th Amendment to the Constitution of the United States was raised in the Supreme Court of Pennsylvania in the brief on behalf of petitioner filed therein, pages 36-39 inclusive (R. 404-407), and enlarged upon in paragraph 10 of the Petition for Reargument, pages 11-14 of the printed petition (R. 483-486). Printed copies Brief and Petition for Reargument filed with the Supreme Court of Pennsylvania have been filed with this petition.

## Questions Presented.

1. Does a State statute purporting to regulate the entire milk industry of the State, including the handling of milk by producers and milk dealers generally, violate the equal protection clause of the 14th Amendment to the Constitution of the United States when, as construed by the highest court of the State, it provides that milk dealers who *buy* milk from producers must pay minimum prices prescribed by a Milk Control Commission, but milk dealers who sell or handle milk *on consignment* from producers are not subject to the price-fixing provisions of the statute?

2. Does a State statute purporting to regulate the entire milk industry of the State, including the handling of milk by producers and milk dealers generally, violate the equal protection clause of the 14th Amendment of the Constitution of the United States when, as construed by the highest court of the State, it provides that milk dealers who *buy* milk from producers must file bonds with the State for the protection of producers, but milk dealers who sell or handle milk *on consignment* from producers need not comply with the bonding provisions of the statute?

## Statute Involved.

The Milk Control Law of the Commonwealth of Pennsylvania, enacted April 28, 1937, P. L. 417, 31 PS Section 700j,

is the statute involved. That act substantially reenacted and superseded the Milk Control Board Law of January 2, 1934, Special Session P. L. 174, as amended by the Act of April 30, 1935, P. L. 96. The Milk Control Board Law was declared constitutional by the Supreme Court of Pennsylvania in the cases of *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 A. 336 (1936), and *Eisenberg Farm Products* v. *Milk Control Board*, 332 Pa. 34, 200 A. 854 (1938), reversed by the Supreme Court of the United States on another ground in 306 U. S. 346, 59 S. Ct. 528 (1939). The Milk Control Law of 1937 was declared constitutional by the Supreme Court of Pennsylvania in *Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 332 Pa. 15 (1 A. (2d) 775) (1938). In *Harrisburg Dairies, Inc.* v. *Eisaman, et al.*, 338 Pa. 58, 11 A. (2d) 875 (1940), the Supreme Court of Pennsylvania declared that the bonding provisions of the Milk Control Law were constitutional beyond doubt.

The Supreme Court of Pennsylvania in the decision appealed from has stated that the Milk Control Law of 1937 contains an arbitrary and capricious discrimination between some milk dealers and others, and some milk producers and others, and have held that the Commonwealth of Pennsylvania, through the Milk Control Commission, has no power to regulate minimum prices to be paid milk producers unless they sell their milk outright to the milk dealers, and no power to require milk dealers who receive milk on consignment to file bonds for the protection of milk producers, although the Commonwealth does have the power and duty to require bonds of milk dealers who buy milk from producers.

The portions of the Milk Control Law involved read as follows:

"Preamble.

"WHEREAS, The production, sale and distribution of milk and certain milk products in this Commonwealth,

are attendant with serious conditions affecting milk producers, milk dealers and consumers of milk, the following legislative findings of fact with respect thereto are hereby made:

"1. Milk is the most necessary human food, vital for promotion of the public health and for development of strength and vigor in the race. It is a most fertile field for the growth of bacteria, and therefore its production and distribution have been surrounded by more costly sanitary requirements than those of any other commodity in this, the third greatest milk producing and consuming state of the nation.

"2. Milk consumers are not assured of a constant and sufficient supply of pure and wholesome milk unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk. If this is not done, large numbers dispose of their herds or engage in milk strikes, and remaining producers supply unhealthful milk or milk of lower quality because of financial inability to comply with sanitary requirements and to keep vigilant against contamination. Public health is menaced when milk dealers do not or cannot pay a price to producers commensurate with the cost of sanitary production, or when consumers are required to pay excessive prices for this necessity of life.

"3. Milk dealers must handle constant surpluses to meet the emergency requirements of normal variations in fluid consumption and to meet seasonal variations in production, which amounts in excess of fluid requirements must find a market in fluid use or in manufacture, and tend to demoralize the industry. Only one per centum of the milk dealers of the Commonwealth handle over sixty percentum of the milk sold by producers to dealers; and persons have often combined privately to establish practices or fix prices to the detriment of producers or consumers.

"4. Milk producers must make delivery of their highly perishable commodity immediately after it is

produced, and must generally accept any market at any price. Under the utilization method of payment prevailing in the milk industry, particularly in cities, the value of this market is unknown until the milk dealer sells the fluid milk and uses or disposes of the surplus. Furthermore, only the dealers have facilities for accurately weighing and testing milk This knowledge of weights, tests and uses is in the exclusive possession of the dealer. The producers' lack of control over their market is aggravated by the trade custom of dealers in paying weeks after delivery, keeping producers obligated to continue delivery in order to receive payment for previous sales, and permitting dealers to operate on the producers' capital without giving security therefor. Hence, milk producers are subject to fraud and imposition, and do not possess the freedom of contract necessary for the procuring of cost of production.

"WHEREAS, Public control of the milk industry in recent years is stabilizing the conditions therein, and a relaxation of control will cause a return to the unhealthful, uneconomic, deceptive and destructive practices of the past with respect to this paramount industry upon which the health and welfare of the Commonwealth largely depends; and

"WHEREAS, It is necessary to preserve and promote the strength and vigor of the inhabitants of this Commonwealth, to protect the public health and welfare, and to prevent fraud and imposition upon consumers and producers by continuing to treat the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth of Pennsylvania as a business affecting the public health and affected with a public interest."

"Section 101. Legislative Purpose.—In the exercise of the police power of the Commonwealth, it is hereby declared that the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth is a business affecting the public health and affected with a public interest, and it

is hereby declared that this act shall be and is hereby enacted for the purpose of regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud.

* * * * * * *

Section 103. Definitions; Construction.—The following terms shall be construed in this act to have the following meanings, except in those instances where the context clearly indicates otherwise:

* * * * * * *

"'Milk dealer' means any person, including any store or subdealer, as hereinafter defined, who purchases or handles milk within the Commonwealth, for sale, shipment, storage, processing or manufacture, within or without the Commonwealth. A producer who delivers milk to a milk dealer only shall not be deemed a milk dealer. A cooperative agricultural association or corporation of producers of milk, organized under the laws of this Commonwealth or of any other state, and engaged in making collective sales of milk for producers under contract with it, shall not be deemed a milk dealer, but shall be deemed a producer: Provided, however, That if such association or corporation distributes milk within this Commonwealth to stores, as defined in this act, or to consumers, as defined in this act, it shall be deemed to be a milk dealer as to that part of its business, and shall be governed by the provisions of this act applicable thereto: And provided further, That such cooperative agricultural association or corporation shall be governed by the applicable provisions of this act as to the prices at which it sells, markets, or bargains to sell milk within this Commonwealth to milk dealers and others.

* * * * * * *

"Section 301. Regulation of Milk Industry.—The commission is hereby declared to be the instrumentality

of the Commonwealth for the purpose of administering the provisions of this act and to execute the legislative intent herein expressed, and it is hereby vested with power to supervise, investigate and regulate the entire milk industry of this Commonwealth, including the production, transportation, disposal, manufacture, processing, storage, distribution, delivery and sale of milk and milk products in this Commonwealth, and including the establishment of reasonable trade practices, systems of production control and marketing area committees in connection therewith: Provided, however, That nothing contained in this act shall be construed to alter, amend or repeal any of the laws of this Commonwealth relating to the regulation of public utilities, or to the public health or to the prevention of fraud and deception, except as herein otherwise specifically provided.

"Section 302. Specific Powers not Impairment of General Powers.—The operation and effect of any provision of this act conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this act of a specific power or powers.

* * * * * * *

"Section 501. Milk Dealers Required to File Bonds. —It shall be unlawful for a milk dealer to purchase milk from producers unless the milk dealer shall file with the commission a corporate surety, individual surety, or collateral bond, approved by the commission. Except as otherwise herein provided, the bond shall be in a sum equal to the value of the highest aggregate amount of milk purchased by the dealer from producers in any one month during the preceding calendar year, which value shall be computed according to lawful prices, and shall not in any event exceed one hundred thousand dollars ($100,000.00). The bond shall be upon a form prescribed by the commission, conditioned for the payment by the milk dealer of all amounts due, including amounts due under this act and the orders

of the commission, for milk sold by such producers to the milk dealer during the license year, upon such terms and conditions as the commission may prescribe.

"In the case of a milk dealer who pays producers in full each week for milk purchased by him from such producers, the bond shall be in a sum equal to fifty per centum of the value of the highest aggregate amount of milk purchased by the realer from producers in any one month during the preceding calendar year, which value shall be computed according to lawful prices, and shall not in any event exceed fifty thousand dollars ($50,000.00).

"Section 502. Computation of Amount of Certain Bonds.—Milk purchased by a milk dealer from producers outside the Commonwealth, and sold by such dealers as fluid milk within the Commonwealth, shall be included in computing the amount of such dealer's bond, except where such dealer has filed a bond for the protection of such producers with the state wherein the milk is purchased or with such producers. In such computation, the amount due for such milk shall be determined according to any applicable official prices or any lawful contract price.

"A milk dealer purchasing or intending to purchase milk from producers, but not so engaged during any month of the preceding calendar year, shall file a bond in a reasonable sum to be fixed by the commission, and within the time for filing his application such dealer shall request the commission to fix such sum.

"Section 503. Time of Filing.—The bond herein required shall be filed with the dealer's application for a license, and shall be filed within the time for filing such application.

* * * * * * *

"Section 801. Requisites of Orders, Fixing Price of Milk.—The commission shall ascertain, after a hearing in which all interested parties shall be given reasonable opportunity to be heard, the logical and reasonable milk marketing areas within the Commonwealth, shall

describe the territorial extent thereof, shall designate such areas by name or number, and shall ascertain and maintain such prices for milk in the respective milk marketing areas as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein.

"The commision shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

"The commission shall file at its office, with each order issued, a general statement in writing of the findings of fact in support of, and the reasons for, such order.

"The commission may, upon its own motion or upon application in writing, from time to time, alter, revise or amend an official order defining milk marketing areas or fixing prices to be charged or paid for milk. Before making, revising or amending any order defining milk marketing areas or fixing prices to be charged or paid for milk, the commission shall hold a hearing, after giving reasonable notice thereof to interested persons, of whom the commission has notice, and, in the case of any order affecting the public, after giving reasonable notice thereof to the public in such newspaper or newspapers as, in the judgment of the commission, shall afford sufficient notice and publicity: Provided, however, That upon application in writing from a person aggrieved by an order of the commission hereunder, filed within fifteen (15) days after the issuance of the order complained of, or upon its own motion, the commission may, within twenty (20) days after the effective date of such order, issue an order revising or amending such order without a further hearing, if such revision or amendment is based on the record of the hearing held prior to the issuance of such order.

"Every order made pursuant to this article, and any revision or amendment thereof, in which the commission fixes or changes the price of milk to producers or to consumers, or both, shall be subject to the approval of the Governor.

* * * * * * *

"Section 803. Prices to Producers.—The commission shall fix, by official order, the minimum prices to be paid by milk dealers to producers for milk: Provided, however, That the fixing of prices to be paid by milk dealers to producers for milk to be used solely in manufacturing shall be discretionary with the commission."

**Statement of Facts.**

The reasons for and purposes of milk control legislation in Pennsylvania are to be found in the preamble to the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, quoted above. Nowhere in the preamble or in the sections of the act quoted does it appear that the act was to be a narrow regulation of the milk industry in Pennsylvania. On the contrary, it would appear that the act was to provide for the fixing of minimum prices to be paid producers and to require milk dealers to file bonds for the protection of milk producers unless there were specific exceptions. The original Milk Control Board Law of January 2, 1934, Special Session P. L. 174, was amended by the Act of April 30, 1935, P. L. 96. This act was held not to be repugnant to the Constitution of the United States in *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 A. 336 (1936). The Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j reenacted and extended the Milk Control Board Law. This Act was held to be in consonance with the Constitution of the United States in *Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 332 Pa. 15, 1 A. (2d) 775 (1938). These decisions were relied upon by the

Supreme Court of the United States in *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346, 350, 59 S. Ct. 528, 83 L. Ed. 752 (1939), holding that a state statute (the Pennsylvania Milk Control Board Law), providing for the licensing and bonding of milk dealers and the fixing of minimum prices to be paid producers, may be enforced against a milk dealer operating a milk receiving plant within the state for the purchase of milk for shipment beyond the state.

On December 19, 1938, seventeen of the respondents filed a bill in equity in the Court of Common Pleas of Dauphin County, Pennsylvania, against the Milk Control Commission, petitioner herein, and the Attorney General of Pennsylvania, to restrain them from instituting civil or criminal proceedings, except proceedings before the Commission itself, against the respondents, by reason of certain contracts between the respondents and milk producers from whom they obtained the milk they handled, and from demanding that the respondents comply with the bonding and price-fixing provisions of the Milk Control Law (R. 1, 4). The plaintiffs claimed that they received milk by virtue of consignment contracts rather than by a sale of the milk by producers to them. They contended that this arrangement relieved them of the obligation under the Act to pay producers minimum prices or to file bonds for the protection of producers with the Milk Control Commission under the terms of the Act. A preliminary injunction was awarded on injunction affidavits (R. 21). The eighteenth respondent intervened as a party plaintiff on March 24, 1939 (R. 59). Pleadings were completed on April 4, 1939, and for three days testimony was taken before a judge specially presiding (R. 66-284). Testimony was stopped without apparently being completed and counsel asked to argue the legal questions involved. The legal questions were argued before the court on December 8, 1939. On March 26, 1940,

the court entered a *decree nisi* that ended in a final decree on May 1, 1940 (R. 317, 352-355). In the meantime no more testimony had been taken, the contracts themselves disappeared from the records of the court, and material stipulated to be furnished the court as part of the record never was filed (R. 286, 287). On appeal the decree was affirmed in a terse opinion that failed to specifically answer any of the contentions of the appellants. Dissenting opinions were filed by the original Chancellor in the Dauphin County Court (R. 318) and by two of the Justices in the Supreme Court of Pennsylvania (R. 465). The decision in the Supreme Court of Pennsylvania was handed down on October 28, 1940 (R. 463). A petition for reargument was denied on November 26, 1940 (R. 471). This petition for certiorari followed.

**Basis of Decisions Below.**

The Court of Common Pleas of Dauphin County in granting the injunction in this case purported to examine the Milk Control Law of April 28, 1937, P. L. 417, 31 P. S. Section 700j, to ascertain whether this Act "makes consignment contracts subject to its provisions" (R. 292). "The questions, therefore, are whether the Act requires dealers who enter into consignment contracts to comply with the bonding and price-fixing provisions of the statute" (R. 298). The court concluded that the use of the words "buy" and "sell" in certain sections of the Act without the specific use of the word "consignment" meant that transactions of consignment were beyond the scope of the Act. The court did not concede that other language used in the Act could be broad enough to include numerous transactions, of which handling on consignment would be one, without specifying that the Act covered milk handled on consignment, bailment lease, sale or return, or other transactions besides sales.

Although the opinion of the court occupies 26 pages (R. 292a-317a), the court only once mentioned *Rohrer* v. *Milk*

*Control Board,* 322 Pa. 257, 186 A. 336 (R. 299), declaring the constitutionality of the original Milk Control Board Law of Pennsylvania, and did not mention any other cases from the Supreme or Superior Courts of Pennsylvania declaring the constitutionality of the Milk Control Law. The court denied the contention of the petitioner that the word "purchase", as used in the Pennsylvania Milk Control Law, should be interpreted in the same manner as the same word was interpreted by the Supreme Court of the United States in *United States* v. *Rock Royal Cooperative, Inc.,* 307 U. S. 533, 579-580, 60 S. Ct. 993, 83 L. Ed. 1446 (1939) (R. 312-313).

An examination of the opinion of the majority of the Court of Common Pleas of Dauphin County and the dissenting opinion filed therein by the original Chancellor (R. 318a-335a) shows that the dissenting opinion was written before the majority opinion. The decision of the Court of Common Pleas of Dauphin County created a classification of milk dealers that has no significance or basis so far as is revealed by the foundation or purpose of the Milk Control Law set forth in its preamble.

The effect of this interpretation was pointed out to the Supreme Court of Pennsylvania, and it was especially urged that such an interpretation reopened the question of the constitutionality of the Milk Control Law. In spite of this, the Supreme Court of Pennsylvania affirmed the decree of the court below without citing a single prior case that had come before it involving any question of the validity or interpretation of the Milk Control Law or its predecessor statutes in Pennsylvania. The dissenting opinion did not discuss the constitutional questions but did urge the adoption of the interpretation of the word "purchased", pronounced by the Supreme Court of the United States in *United States* v. *Rock Royal Cooperative,* 307 U. S. 533, 579-580 (R. 468-469).

Because, *inter alia,* the constitutional question raised had not been overtly disposed of by the Supreme Court of Pennsylvania, a petition for reargument was presented to that court. An answer to the petition was filed by respondents. Without opinion the Supreme Court refused to hear reargument (R. 509).

**Specification of Errors to be Urged.**

1. The Supreme Court of Pennsylvania erred in holding that although the Milk Control Law of April 28, 1937, P. L. 417, 31 P. S. Section 700j, does not violate the Constitution of the United States, this statute requires milk dealers who buy milk from producers to pay minimum prices prescribed by the Milk Control Commission of Pennsylvania but exempts milk dealers who sell or handle milk received on consignment from producers.

2. The Supreme Court of Pennsylvania erred in holding that although the Milk Control Law of April 28, 1937, P. L. 417, 31 P. S. Section 700j, does not violate the Constitution of the United States, it requires milk dealers who buy milk from producers to file bonds with the State for the protection of producers but exempts milk dealers who sell or handle milk received on consignment from producers from filing bonds.

3. The Supreme Court of Pennsylvania erred in sustaining the decree granting the injunction against the petitioner's demanding from the respondents that the consignment contracts entered into between them and producers of milk comply with the bonding provisions and price-fixing provisions of the Milk Control Law of April 28, 1937, P. L. 417, 31 P. S. section 700j, and the general orders of the Milk Control Commission of Pennsylvania so far as they relate to the purchase of milk.

**Reasons for Granting the Petition.**

1. The present case creates a distinction between milk dealers that has no basis in the legislative findings of fact set forth in the preamble to the Milk Control Law, and, therefore, by arbitrarily subjecting some milk dealers to price-fixing and bonding regulations denies the equal protection of the laws to the producers who send their milk to those dealers exempted from the Milk Control Law by this interpretation, and to the milk dealers who are required to pay minimum prices for milk and file bonds with surety or collateral for producers.

2. The Supreme Court of Pennsylvania, by creating the distinction it has, would appear to have created an irreconcilable conflict between this case and its prior decisions upholding the constitutionality of the Milk Control Law and its predecessor statutes. Either the Supreme Court of Pennsylvania was right in the present case and wrong in *Rohrer* v. *Milk Control Board,* 322 Pa. 257, 186 A. 336 (1936), *Colteryahn Sanitary Dairy* v. *Milk Control Commission,* 332 Pa. 15, 1 A. (2d) 775 (1938), *Eisenberg Farm Products* v. *Milk Control Board,* 332 Pa. 34, 200 A. 854 (1938), and *Harrisburg Dairies, Inc.* v. *Eisaman,* 338 Pa. 58, 11 A. (2d) 875 (1940), or else the Supreme Court of Pennsylvania was right in the latter cases and erred in its decision in the present case.

3. The Supreme Court of the United States in *Nebbia* v. *New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469, declared the validity of state regulation of minimum prices to be paid producers for milk. The present decision places a serious limitation upon the effectiveness of such legislation and makes a review of the decision desirable as a guide to all States having milk control laws. In a note discussing this case appearing in the University

of Pennsylvania Law Review, Vol. 89, No. 3, pages 403-405, January, 1941, the serious effect of the present decision is pointed out. The same note points out that milk control laws now exist in twenty states and cites the present acts in each of those states.

4. The constitutionality of the then milk control law of Pennsylvania, predecessor to the present Milk Control Law of Pennsylvania, was recognized and relied upon by the Supreme Court of the United States in *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 753 (1939). The present decision in some ways disregards this decision of the Supreme Court of the United States, and the refusal of a writ of certiorari would cast doubt upon the scope and effectiveness of both *Nebbia* v. *New York,* 291 U. S. 502; and *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346.

5. The present decision is in conflict with *United States* v. *Rock Royal Cooperative, Inc.,* 307 U. S. 533, 579-580, 60 S. Ct. 993, 83 L. Ed. 1446 (1939), so far as the interpretation of the language of milk control laws is concerned. See 89 University of Pennsylvania Law Review, 405, notes 18 and 19. While a State is not compelled to accept the construction of statutes adopted by the Supreme Court of the United States, nevertheless, where, as in this case, the Supreme Court of the United States is the only court that has previously passed upon the construction of a certain type of legislation, a State court should not adopt a different construction unless different surrounding circumstances warrant the distinction.

6. The present decision effectively enables milk dealers to avoid the price-fixing and bonding provisions of milk control laws by creating a relationship with their producers, under circumstances in which the producers cannot refuse

to sign the contracts, that denies the Commonwealth of Pennsylvania and the producers affected control of the minimum prices that must be paid producers for milk, in order to maintain an adequate supply of pure and wholesome milk for the inhabitants of the Commonwealth. With the advent of spring the flush of milk will lead to the widespread use of consignment contracts and bring about the chaos in the milk industry that legislation and the decision of the Supreme Court of the United States in *Nebbia* v. *New York*, 291 U. S. 502, corrected.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of the Supreme Court of the United States, directed to the Supreme Court of Pennsylvania, requiring that court to certify the record and the case herein to the Supreme Court of the United States for its review and determination.

MILK CONTROL COMMISSION OF THE
COMMONWEALTH OF PENNSYLVANIA,
By JOHN M. McKEE, *Chairman*,
JOHN J. SNYDER, *Member*,
*Petitioner.*
CLAUDE T. RENO,
*Attorney General*,
FRANK E. COHO,
*Deputy Attorney General*,
*Counsel for Petitioner.*

STATE OF PENNSYLVANIA,
*County of Dauphin, ss:*

Claude T. Reno, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein; that he has read the within petition and knows the contents

thereof, and that the allegations in the said petition are true to the best of his knowledge, information and belief.

CLAUDE T. RENO.

Sworn to and subscribed before me this 14th day of February, 1941.

LUCILLE A. STROUP,
*Notary Public.*

[SEAL.]

My commission expires March 5, 1943.

**Certificate of Counsel.**

I hereby certify that the foregoing petition is in my opinion well founded and entitled to the favorable consideration of the Supreme Court of the United States, and that it is not filed for the purpose of delay.

CLAUDE T. RENO,
*Attorney General.*

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1940

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# No. 766

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MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

*Petitioner,*

*vs.*

CLARENCE GREEN, TRADING AS GREEN'S DAIRY; G. P. JULIUS, TRADING AS JULIUS' DAIRY; JAMES SUTCLIFF, OF ARNOLD ICE CREAM COMPANY; GEORGE M. COOPER, TRADING AS QUALITY AND SERVICE DAIRY; R. E. NOGLE, TRADING AS SHILOH DAIRY; PAUL J. BECK, TRADING AS BECK'S DAIRY; R. H. EISENHART, TRADING AS EISENHART'S DAIRY; J. B. WARNER OF WARNER AND SONS' DAIRY; WALTER C. HOWE, TRADING AS HOWE'S DAIRY; PAUL E. LANDIS, TRADING AS LANDIS DAIRY; RYDER'S DAIRY, INC.; CHARLES A. HOAK, TRADING AS HOAK'S MODERN DAIRY; G. P. PARTHEMORE AND SONS, A PENNSYLVANIA CORPORATION; LOUIS J. MALLOY, OF MALLOY'S DAIRY; H. W. ERDMAN, OF LYKENS DAIRY; EDWARD HONICKER, TRADING AS HONICKER'S DAIRY; EARL H. FETTER, TRADING AS FETTER'S DAIRY (PLAINTIFFS), AND TITUSVILLE DAIRY PRODUCTS COMPANY, A PENNSYLVANIA CORPORATION (INTERVENING PLAINTIFF).

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### Specifications of Error.

The Supreme Court of Pennsylvania erred in the following respects:

1. The Supreme Court of Pennsylvania erred in holding that although the Milk Control Law of April 28, 1937,

P. L. 417, 31 PS Section 700j, does not violate the Constitution of the United States, this statute requires milk dealers who buy milk from producers to pay minimum prices prescribed by the Milk Control Commission of Pennsylvania but exempts milk dealers who sell or handle milk received on consignment from producers.

2. The Supreme Court of Pennsylvania erred in holding that although the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, does not violate the Constitution of the United States, it requires milk dealers who buy milk from producers to file bonds with the State for the protection of producers but exempts milk dealers who sell or handle milk received on consignment from producers from filing bonds.

3. The Supreme Court of Pennsylvania erred in sustaining the decree granting the injunction against the petitioner demanding from the respondents that the consignment contracts entered into between them and producers of milk comply with the bonding provisions and price-fixing provisions of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS section 700j, and the general orders of the Milk Control Commission of Pennsylvania so far as they relate to the purchase of milk.

## ARGUMENT.

**1. The construction of the Milk Control Law by the Supreme Court of Pennsylvania creates an arbitrary classification of milk dealers.**

The construction of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, adopted by the Supreme Court of Pennsylvania, creates a classification of milk dealers that is arbitrary and capricious. Instead of having a relationship to the purposes of the Milk Control Law this

construction thwarts those purposes by enabling a milk dealer to avoid the requirements of the Act to pay minimum prices to producers.

The Supreme Court of the United States has recognized that milk dealers may be so classified as to fall into arbitrary groups between which no distinction for purposes of regulation can be made. In *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, 56 S. Ct. 457, 80 L. Ed. 675 (1936), it was held that a New York statute allowing dealers in unadvertised milk in cities of over one million inhabitants to sell fluid milk at one cent per quart below that of milk sold under well advertised trade names, provided that the dealers were engaged in business at the date when the original statute became effective, and forbidding those who became dealers in unadvertised milk after that date to sell at a price lower than the price fixed for milk sold under well advertised trade names, violated the equal protection clause of the 14th Amendment, because the distinction was arbitrary and discriminatory. In the present case it is much clearer that the distinction is arbitrary and capricious.

The purpose of the Milk Control Law was to protect producers of milk so that an adequate supply of pure and wholesome milk would always be available to the public, by requiring that minimum prices be paid producers for milk and bonds be filed with the Milk Control Commission for the protection of producers. Nothing in this purpose can indicate the slightest intention to create a distinction such as that made by the Supreme Court of Pennsylvania in the present case. When we consider the facts of the present case it becomes even clearer that such a distinction, even if it had been made in the Act expressly, would make the statute unconstitutionally discriminatory. A milk dealer who gets his producer to sign a contract of consignment rather than obtain milk by the usual implied contract to buy at not less than minimum Commission prices, is given free-

dom of regulation so far as minimum prices to be paid producers and the protection of those prices are concerned. The Milk Control Commission of Pennsylvania may compel a milk dealer to pay his producers minimum prices when he buys milk, but the minute that the Milk Control Commission tries to enforce a price order the milk dealer announces that he is receiving his milk on consignment. Because the producers are not organized they individually sign consignment contracts to hold their market for milk during flush periods, and must remain under those contracts at all times or lose their markets because other producers also have signed contracts.

In a long line of decisions the Supreme Court of the United States has held that the equal protection clause of the 14th Amendment assures all persons freedom from arbitrary and discriminatory legislation. The Supreme Court of the United States has held that individuals may not be favored over corporations (*Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928)), or corporations over individuals (*Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929)). As the Supreme Court of the United States said in the latter case (278 U. S. at 522):

> "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances."

Since Section 503 of the Milk Control Law, quoted above, makes the filing of a bond for the protection of milk dealers an accompaniment of an application for a license, the Commission in issuing licenses to thousands of milk dealers must inquire into each application to determine whether a bond need be filed or not with the application of a particular applicant. To grant licenses without the bonds would subject the Commission to suit for failure to perform its duty.

To refuse to issue a license unless the bond did accompany the application would tend to have the Commission in contempt of the Supreme Court of Pennsylvania if it withheld the license of a milk dealer protected by the decision of the Supreme Court of Pennsylvania. Surely the legislature could not have meant to place the Commission in such a dilemma.

As interpreted by the Supreme Court of Pennsylvania, however, the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, denies milk producers sending milk to dealers on consignment the protection of the price-fixing and bonding provisions of the Act. It denies milk dealers who buy milk from producers the equal protection of the laws by compelling them to obey provisions that the dealers operating on consignment need not respect. Finally it denies the equal protection of the laws to the Milk Control Commission of the Commonwealth of Pennsylvania by preventing the Commission from enforcing its orders on behalf of producers who ship milk on consignment and prevents the Commission from requiring bonds of those same dealers.

**2. The Supreme Court of Pennsylvania should have followed its prior decisions or else overruled them.**

The Supreme Court of Pennsylvania has never denied the constitutionality of the Milk Control Law or its predecessor, the Milk Control Board Law: *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 A. 336 (1936); *Eisenberg Farm Products* v. *Milk Control Board*, 332 Pa. 34, 200 A. 854 (1938); *Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 332 Pa. 15, 1 A. (2d) 775 (1938); *Harrisburg Dairies, Inc.* v. *Eisaman*, 338 Pa. 58, 11 A. (2d) 875 (1940).

In the present case the Supreme Court of Pennsylvania did not purport to overrule its prior decisions, but, as pointed out above, the distinction made creates a violation of the 14th Amendment to the Constitution of the United

States. Such a construction cannot be allowed to stand. Having once decided the constitutionality of the Milk Control Law it was incumbent upon the Supreme Court of Pennsylvania to interpret the provisions of the law in a constitutional manner. Therefore, if there possibly could be a constitutional construction of the Milk Control Law, the Supreme Court of Pennsylvania was bound to follow that construction.

**3. The language of the Milk Control Law did not require the Construction adopted by the Supreme Court of Pennsylvania.**

A review of the foregoing provisions of the Milk Control Law shows that the Milk Control Law did not necessarily exempt dealers handling milk on consignment. The definition of milk dealers includes anyone who handles milk for sale, shipment, storage, processing or manufacturing. Section 803 of the Milk Control Law, which provides for the fixing of minimum prices to be paid producers simply states:

> "The commission shall fix, by official order, the minimum prices to be paid by milk dealers to producers for milk: Provided, however, That the fixing of prices to be paid by milk dealers to producers for milk to be used solely in manufacturing shall be discretionary with the commission."

Surely this provision does not declare a distinction between dealers who buy milk and those who receive milk on consignment for sale.

The first sentence of Section 501 of the Milk Control Law which requires milk dealers to file bonds reads:

> "It shall be unlawful for a milk dealer to purchase milk from producers unless the milk dealer shall file with the commission a corporate surety, individual

surety, or collateral bond, approved by the commission."

The Supreme Court of Pennsylvania need only to have followed the construction of the word "purchased" adopted by the Supreme Court of the United States in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 579-580, 60 S. Ct. 993, 83 L. Ed. 1446 (1939), to maintain the constitutionality of the Milk Control Law.

Any peculiarities caused by the punctuation of the Milk Control Law disappear in determining its meaning because punctuation in Pennsylvania statutes is added after the statute has become a law: *Gyger's Estate*, 65 Pa. 312 (1870); *Commonwealth* v. *Shopp*, 1 Woodward (Pennsylvania) 123 (1863); *Eshelman's Appeal*, 75 Pa. 42 (1873); *Starck* v. *Union Central Life Ins. Co.*, 143 Pa. 45, 19 Atl. 703 (1890).

**4. This case should be returned to the Supreme Court of Pennsylvania for reconsideration.**

The instant case is one that leaves the state of the present Milk Control Law of Pennsylvania in doubt. Either the instant decision makes the whole act unconstitutional or else the act is unconstitutional and the present decision is erroneous. It would therefore seem that the proper remedy of the situation is for the Supreme Court of the United States to grant a writ of certiorari to the Supreme Court of Pennsylvania for review of the record and thereupon for the Supreme Court of the United States to remit the case to the Supreme Court of Pennsylvania for further consideration in accordance with an opinion of the United States Supreme Court to be filed setting forth the necessity that state statutes afford the equal protection of the laws that the 14th Amendment to the Constitution of the United States has guaranteed. This disposition of the case would

be in consonance with *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920 (1940), in which the Supreme Court of the United States returned a case to a state court for redecision where the meaning of the court's deduction was not certain enough for decision of the case by the Supreme Court of the United States.

**Conclusion.**

It is, therefore, respectfully submitted that the Supreme Court of Pennsylvania erred in failing to follow its prior decisions and the decisions of the Supreme Court of the United States upholding and interpreting the milk control laws of Pennsylvania and of the United States; that the decision of the Supreme Court of Pennsylvania in this case creates a statutory distinction that is arbitrary, capricious and denies the equal protection of the laws to certain producers, certain dealers and the Milk Control Commission of the Commonwealth of Pennsylvania; that it is necessary that milk control laws be similarly interpreted so that they can accomplish the great public good both within states and throughout the United States that they were designed to accomplish; and that a writ of certiorari should issue to the Supreme Court of Pennsylvania in order that the questions hereby presented may be reviewed by the Supreme Court of the United States.

Respectfully submitted,

FRANK E. COHO,
*Deputy Attorney General,*
CLAUDE T. RENO,
*Attorney General.*

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1940

## No. 766

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

*Petitioner,*

*vs.*

CLARENCE GREEN, Trading as Green's Dairy; G. P. Julius, Trading as Julius' Dairy; JAMES SUTCLIFF, of Arnold Ice Cream Company; GEORGE M. COOPER, Trading as Quality and Service Dairy; R. E. NOGLE, Trading as Shiloh Dairy; PAUL J. BECK, Trading as Beck's Dairy; R. H. EISENHART, Trading as Eisenhart's Dairy; J. B. WARNER of Warner and Sons' Dairy; WALTER C. HOWE, Trading as Howe's Dairy; PAUL E. LANDIS, Trading as Landis Dairy; RYDER'S DAIRY, INC.; CHARLES A. HOAK, Trading as Hoak's Modern Dairy; G. B. PARTHEMORE & SONS, a Pennsylvania Corporation; LOUIS J. MALLOY, of Malloy's Dairy; H. W. ERDMAN, of Lykens Dairy; EDWARD HONICKER, Trading as Honicker's Dairy; EARL H. FETTER, Trading as Fetter's Dairy, and TITUSVILLE DAIRY PRODUCTS COMPANY, a Pennsylvania Corporation.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

## BRIEF OF RESPONDENTS OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.


Willis F. Daniels,
George H. Hafer,
Rose Daniels,
Harold W. Swope,
Elmer E. Harter, Jr.,
*Counsel for Respondents.*

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1940

# No. 766

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

*Petitioner,*

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CLARENCE GREEN, TRADING AS GREEN'S DAIRY; G. P. JULIUS, TRADING AS JULIUS' DAIRY; JAMES SUTCLIFF, OF ARNOLD ICE CREAM COMPANY; GEORGE M. COOPER, TRADING AS QUALITY AND SERVICE DAIRY; R. E. NOGLE, TRADING AS SHILOH DAIRY; PAUL J. BECK, TRADING AS BECK'S DAIRY; R. H. EISENHART, TRADING AS EISENHART'S DAIRY; J. B. WARNER OF WARNER AND SONS' DAIRY; WALTER C. HOWE, TRADING AS HOWE'S DAIRY; PAUL E. LANDIS, TRADING AS LANDIS DAIRY; RYDER'S DAIRY, INC.; CHARLES A. HOAK, TRADING AS HOAK'S MODERN DAIRY; G. B. PARTHEMORE & SONS, A PENNSYLVANIA CORPORATION; LOUIS J. MALLOY, OF MALLOY'S DAIRY; H. W. ERDMAN, OF LYKENS DAIRY; EDWARD HONICKER, TRADING AS HONICKER'S DAIRY; EARL H. FETTER, TRADING AS FETTER'S DAIRY, AND TITUSVILLE DAIRY PRODUCTS COMPANY, A PENNSYLVANIA CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

## BRIEF OF RESPONDENTS OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

### I.

### Opinions Below.

The opinion and order of the Dauphin County Court of Commonwealth of Pennsylvania is reported in 48 Dauphin

County Reporter, page 385. The dissenting opinion of one judge is also reported at the same place. The opinions are found at pages 292a and 318a respectively, of the record in this Court. The opinion considered and passed upon the sole question of the interpretation and construction of words and terms employed in the Pennsylvania Milk Control Law, enacted April 28, 1937, P. L. 417.

The opinion of the Supreme Court of the Commonwealth of Pennsylvania is reported in 340 Pa. 1, 16 A. 2nd, page 9, and is found at page 463 of the record in this Court. The dissenting opinion follows in order in each instance.

The opinion of the Pennsylvania Supreme Court passed upon the sole question of proper interpretation and construction of the words and terms employed by the Pennsylvania Milk Control Law.

No constitutional or Federal question was raised, considered or passed upon by either court.

The order of the Pennsylvania Supreme Court, made November 26, 1940, denying a petition for reargument is found at page 509 of the record in this Court.

## II.

### Questions Presented.

Should this Court grant a Writ of Certiorari to review a decision of the Supreme Court of Pennsylvania, it being the highest Court of the Commonwealth, which passed solely upon the interpretation and construction of certain language and terms found in the Pennsylvania Milk Control Law, when such Court did not have before it and did not pass upon any Federal questions whatsoever?

## III.

### Statement of the Case.

This proceeding was commenced in the Dauphin County Court by the respondents (plaintiffs below) by way of a

Bill in Equity, praying the court to restrain the Milk Control Commission from proceeding criminally or civilly against them. The plaintiffs were operating as consignee agents for consignor milk producers. The plaintiffs contracted with producers to receive the producers' milk on consignment, to process and market it, and to collect for it on behalf of the producer. The contracts provided for compensation for the consignee agent milk dealer, and provided for certain sums of money to be returned to the consignor milk producer.

The plaintiffs—contending that as consignee agents for the producers, they were not within those particular provisions of the Milk Control Law which require that payments to producers for milk sold by producers to dealers shall be in accord with rates fixed by general orders of the Milk Control Commission, and which require milk dealers purchasing milk from producers to post a bond with the Milk Control Commission—did not comply with those particular provisions.

Plaintiffs contention was that they were, as consignee agents of the producers, not within the particular provisions referred to above because those provisions were, by the language of the Milk Control Law, applicable only to transactions of sale.

The Milk Control Commission took the position that the words and terms of the statute were broad enough in their meaning to cover consignee and agency transactions between a milk producer and a dealer to whom the producer might consign his milk as his agent.

The Commission threatened to proceed against the plaintiffs criminally and civilly for refusing to comply with the above requirements of the Milk Control Law.

The plaintiffs then filed their Bill in Equity raising the question of the interpretation and construction of the pertinent words and terms used in the statute.

The Milk Control Commission opposed the position taken by the plaintiffs, first by attempting to prove that the contracts were not in reality ones of consignment, but rather ones of sale. It abandoned this position later, however, and took the flat position that the statute by its words and terms was broad enough to cover the consignment transaction. (See opinion overruling exceptions, page 352 a of the record in this Court, also dissenting opinion, page 356 a.) *Neither the plaintiffs, nor the Commission, raised any constitutional or Federal question.*

The lower court interpreted the statute as not being broad enough to regulate consignee agent milk dealers and consignor milk producers insofar as transactions between themselves were concerned; and found the act not broad enough to require consignee agent milk dealers to post a bond with the Commission.

The Pennsylvania Supreme Court agreed with the interpretation and construction placed upon the statute by the respondents, and by the lower court. In its appeal to the Pennsylvania Supreme Court, the Commission did not raise a constitutional question or a Federal question in its assignments of Error, found on pages 375-399 of the record in this Court, or in its Questions Involved found at page 369 of the record in this Court.

It is a well established rule in Pennsylvania that the Supreme Court will not pass upon questions if the matter has not been assigned as error.

The Pennsylvania Supreme Court did not in its opinion consider or rule upon any constitutional or Federal question.

## IV.

## ARGUMENT.

### I.

**The highest Court of Appeals in the State has the final word on interpretation and construction of State statutes.**

The sole question raised in the Pennsylvania Supreme Court was limited to the meaning of words and terms used in the Pennsylvania Milk Control Law. The Commission contended for a broader meaning than was contended for by the plaintiffs. The Pennsylvania Supreme Court in affirming the lower court did not support the Commission's contention.

The Pennsylvania Supreme Court of Pennsylvania is the highest court of the Commonwealth of Pennsylvania, and as such is the last word in declaring what a Pennsylvania statute means. All Federal courts must follow the Pennsylvania Supreme Court's interpretation and construction of a Pennsylvania statute.

*Erie Railroad Co.* v. *Tomkins,* 304 U. S. 64;

*Ruklin* v. *N. Y. Life Ins.,* 304 U. S. 202.

This Court, in the very recent case of *Fidelity Union Trust Co.* v. *Ethel Adelaide Field,* U. S. Supreme Court, Advance Opinions, Lawyer's Editions, Vol. 85, #3, page 176, speaking through Mr. Chief Justice Hughes, said at page 178:

> "The court recognized its duty to follow the law of the State and said that where that law had been determined by the state court of last resort its decision must be followed irrespective of the federal court's opinion of what the law ought to be."

"The highest state court is the final authority on state law (cases cited deleted), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State."

"*Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute.* That construction and effect are shown by the judicial action through which the State interprets and applies its legislation." (Italics ours—words within parentheses supplied by us.)

There can be no doubt that the Federal courts are bound by the State law as declared by the highest State court. The interpretation and construction of a State statute is a matter solely within the province of the State courts, and when the highest State court has spoken all other courts including all Federal courts are bound by that court's opinion. This is so even though the Federal court might not agree with the logic or reasoning of Pennsylvania's highest court.

The Pennsylvania Supreme Court has previously declared this statute and its predecessor statutes constitutional. The plaintiffs below in this proceeding did not question the constitutionality of the statute.

The Commission (petitioner) now argues that since the Pennsylvania Supreme Court has interpreted the Pennsylvania Milk Control Law as it did in this case, the statute becomes unconstitutional as it violates the equal protection clause of the 14th Amendment of the United States Constitution. It contends that the opinion in this case is in conflict with the former opinions holding the statute constitutional. This is fallacious reasoning, the Commission is assuming that the Pennsylvania Supreme Court, when it

held the milk statute constitutional, also held that every action of a milk dealer and milk producer was within the purview of the statute. Such an assumption is totally unwarranted. The Pennsylvania Supreme Court in the case at bar, by interpreting and construing the statute, announced its effect from the date of its enactment. It cannot be presumed that it considered the law to be different now from what it was formerly. Hence when it passed upon the constitutionality of the statute in former decisions, it must be assumed it did so realizing the law to be as pronounced in the case at bar. The constitutionality of the statute has not been questioned, and cannot be, in this case. The constitutionality of the statute stands undisturbed.

The Commission also argues that the Pennsylvania Supreme Court's interpretation and construction of the Pennsylvania statute should have followed your Honorable Court's interpretation of the Federal Marketing Agreement Act. This is not the law as above pointed out. The Pennsylvania Supreme Court is free and unfettered when it is interpreting a Pennsylvania statute, and is not bound to interpret or construe words or phrases as the Federal court did when passing upon a Federal statute. In passing, we should like to mention that the Pennsylvania Milk Control Law and the Federal Marketing Agreement Act are worded very differently, and have different objects. It is most significant, however, that your Honorable Court, in its decision in the case of *U. S.* v. *Rock Royal Corp.*, 297 U. S. 533, held that the act left the producer and his consignee agent free to contract as they saw fit.

II.

**A Federal question cannot be raised for the first time after judgment of the Pennsylvania Supreme Court.**

The Commission, in its thirty-one (31) assignments of error (R. 375 to 399) filed when it took the appeal from the

Dauphin County Court did not raise a Federal question, nor did its question involved (R. 369) raise a Federal question. It merely argued in its written brief (R. 404-407) that if the Pennsylvania Supreme Court did not support the Commission's contention, the act would violate the equal protection clause of the 14th Amendment of the United States Constitution. The law of Pennsylvania is well settled that the Pennsylvania Supreme Court will pass upon only those matters raised by the assignments of error. This is true even though the questions involved and the argument attempts to raise the matter.

*Pierce* v. *Lehigh Valley Coal Co., Appellant, No. 1,* 232 Pa. 165 at 169;

*Davis, Appellant,* v. *Smith, et al.,* 262 Pa. 432;

*Commonwealth, to Use, Appellant,* v. *Crow, et al.,* 294 Pa. 286.

The Pennsylvania Supreme Court in the case of *Coyne* v. *John Gibbons Coal Co., Appellant,* 314 Pa. 502, speaking through the then Mr. Justice Kephart, said at page 507:

> "There is no assignment of error that raises any question as to such evidence and the questions considered must be based on the assignments."

The Commission in its petition for re-argument in paragraph 10 (R. 483-486) raised the point that the construction placed upon the statute by the Pennsylvania Supreme Court rendered the statute in violation of the United States Constitution. This was not timely. It is too late to raise a Federal question after judgment in a petition for re-argument, unless the State court considers and passes upon the question.

*Angelo Herndon* v. *State of Georgia,* 295 U. S. 441-455, at 442-443, the court said, speaking through Mr. Justice Sutherland:

> "On this appeal, the statute is assailed as contravening the due process clause of the Fourteenth Amend-

ment in certain designated particulars. We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court."

"The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. *The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.* Texas & P. R. Co. *v.* Southern P. Co., 137 U. S. 48, 54, 34 L. Ed. 614, 617, 11 S. Ct. 10; Loeber *v.* Schroeder, 149 U. S. 580, 585, 37 L. Ed. 856, 858, 13 S. Ct. 934; Godchaux Co. *v.* Estopinal, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116; Rooker *v.* Fidelity Trust Co., 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288; Tidal Oil Co. *v.* Flanagan, 263 U. S. 444, 454, 455, 68 L. Ed. 382, 387, 388, 44 S. Ct. 197, and cases cited." (Italics ours.)

The Commission cannot claim that it could not anticipate the construction and interpretation the Supreme Court might place upon the Act, since the pleadings and arguments dealt with nothing else. The lower court first made the interpretation and construction, and this was the sole matter upon which the Commission rested its appeal to the Supreme Court of Pennsylvania. The Commission, therefore, cannot claim to come under the exception to the rule which would permit the raising now of the Federal question, since to come under this exception, the Pennsylvania Supreme Court would have had to construe the act in an unanticipated manner, threatening rights under the Constitution. Here it was not only anticipated, but was the sole subject of controversy. This court has held that an appellant must anticipate that a court might do what was done in another case, and not anticipating it does not save it from the general rule.

In *Angelo Herndon* v. *State of Georgia*, 295 U. S. 441-455, at 446, this Court further said:

> "Appellant, of course, cannot plead ignorance of the ruling in the Carr Case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction."

The Commission is attempting to raise a Federal question now by saying that since the Pennsylvania Supreme Court did not support its contention, the act is in violation of the United States Constitution. This position can find no support. The Milk Control Law of Pennsylvania has repeatedly been declared constitutional and at no time has the Pennsylvania Supreme Court held otherwise.

*Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 A, 336;
*Eisenberg Farm Prod.* v. *Milk Control Board*, 332 Pa. 34, 200 A. 854;
*Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 332 Pa. 15, 1 A (2d) 775;
*Harrisburg Dairies, Inc.* v. *Eisaman, et al.*, 338 Pa. 58, 11 A (2d) 875.

The Commission cannot by this indirect method attack its constitutionality, nor can the Commission by this very novel argument establish jurisdiction in the United States Supreme Court, when the only question the Pennsylvania Supreme Court passed upon was to declare the breadth and effect of a Pennsylvania statute.

Petitioner, relying upon *Minnesota* v. *National Tea Co.*, 309 U. S. 551, asks this court to review the judgment of the Supreme Court of Pennsylvania.

But that case is only an authority controlling the disposition of cases where "there is considerable uncertainty as to the precise grounds for the decision" and where it is not clear whether the court placed its decision on State or Federal constitutional grounds.

It does not have any application to those cases where the decision is based upon a non-Federal ground adequate to support it.

*Fox Films Corp.* v. *Muller*, 296 U. S. 207;
*Bell Tel. Co.* v. *Van Dyke*, 296 U. S. 533.

In the case at bar the opinion is clear and concise, and is based solely upon a non-Federal ground clearly adequate to support it. This we submit is obvious from the following portion of the opinion of the Supreme Court of Pennsylvania (R. 464, 340 Pa. 1, 2) wherein Mr. Chief Justice Schaffer, speaking for the majority said:

> "The principle guiding to decision is this: The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extra judicial. They should act within the strict and exact limits defined: Citizens Passenger Ry. Co. *v.* Public Service Com., 271 Pa. 39, 114 A. 642; Swarthmore Borough *v.* Public Service Com., 277 Pa. 472, 121 A. 488; Blue Mountain Cons. Water Co. *v.* Public Service Com., 125 Pa. Superior Ct. 1, 189 A. 545; State Board of Milk Control *v.* Richman Ice Cream Co., 117 N. J. Equity 296, 175 A 796. With the principle stated before us, turning to the law embodying the powers of the Milk Control Commission, we find nothing said about milk shipped to dealers on consignment. It speaks of the "purchase" of milk by dealers, its "delivery and sale" to them; it uses the words "buy", "purchase", "prices", "bought or sold", "sell or buy." The words "consign" or "consignment" nowhere appear. We are asked by the Commonwealth

to interpolate these words into the Act. This we cannot do without violating the important principle to which we have adverted. If the legislature desires to change the law, this can shortly be demonstrated by an amendment at the coming session, writing into the Act a provision covering milk sent to dealers on consignment."

We respectfully submit that there can be no question but that the Supreme Court of Pennsylvania placed its decision squarely on the fact that the power and authority asserted by the petitioner commission had not been conferred by legislative language clear and unmistakable—a necessary requisite to such power. *This is an adequate non-Federal ground supporting the decision of the Supreme Court of Pennsylvania.*

Petitioner in its brief advances many arguments which need not be discussed, for they are directed at the wisdom of the majority decision of the Supreme Court of Pennsylvania. But this decision being on a subject within the province of that court is binding on this Court.

**Conclusion.**

We respectfully submit that the petition should be denied at the cost of petitioner.

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